Comments

The Embarrassing Second Amendment

Sanford Levinson†

One of the best known pieces of American popular art in this century is the *New Yorker* cover by Saul Steinberg presenting a map of the United States as seen by a New Yorker. As most readers can no doubt recall, Manhattan dominates the map; everything west of the Hudson is more or less collapsed together and minimally displayed to the viewer. Steinberg's great cover depends for its force on the reality of what social psychologists call "cognitive maps." If one asks inhabitants ostensibly of the same cities to draw maps of that city, one will quickly discover that the images carried around in people's minds will vary by race, social class, and the like. What is true of maps of places—that they differ according to the perspectives of the mapmakers—is certainly true of all conceptual maps.

To continue the map analogy, consider in this context the Bill of Rights: Is there an agreed upon "projection" of the concept? Is there even a canonical text of the Bill of Rights? Does it include the first eight, nine,

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† Charles Tilford McCormick Professor of Law, University of Texas Law School. This essay was initially prepared for delivery at a symposium on Interpretation and the Bill of Rights at Williams College on November 4, 1988. I am grateful for the thought and effort put into that conference by its organizer, Professor Mark Taylor. It was he who arranged for Wendy Brown, then a member of the Williams Department of Political Science, to deliver the excellent response that can be found following this article. A timely letter from Linda Kerber contributed to the reorganization of this article. Two long-distance friends and colleagues, Akhil Reed Amar and Stephen Siegel, contributed special and deeply appreciated insights and encouragement. Finally, as always, I took full advantage of several of my University of Texas Law School colleagues, including Jack Balkin, Douglas Laycock, and Lucas Powe.

I should note that I wrote (and titled) this article before reading Nelson Lund's *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987), which begins, "The Second Amendment to the United States Constitution has become the most embarrassing provision of the Bill of Rights." I did hear Lund deliver a talk on the Second Amendment at the University of Texas Law School during the winter of 1987, which may have penetrated my consciousness more than I realized while drafting the article.

or ten Amendments to the Constitution?[1] Imagine two individuals who are asked to draw a "map" of the Bill of Rights. One is a (stereo-) typical member of the American Civil Liberties Union (of which I am a card-carrying member); the other is an equally (stereo-) typical member of the "New Right." The first, I suggest, would feature the First Amendment[2] as Main Street, dominating the map, though more, one suspects, in its role as protector of speech and prohibitor of established religion than as guardian of the rights of religious believers. The other principal avenues would be the criminal procedure aspects of the Constitution drawn from the Fourth,[3] Fifth,[4] Sixth,[5] and Eighth[6] Amendments. Also depicted prominently would be the Ninth Amendment,[7] although perhaps as in the process of construction. I am confident that the ACLU map would exclude any display of the just compensation clause of the Fifth Amendment[8] or of the Tenth Amendment.[9]

The second map, drawn by the New Rightist, would highlight the free

1. It is not irrelevant that the Bill of Rights submitted to the states in 1789 included not only what are now the first ten Amendments, but also two others. Indeed, what we call the First Amendment was only the third one of the list submitted to the states. The initial "first amendment" in fact concerned the future size of the House of Representatives, a topic of no small importance to the Anti-Federalists, who were appalled by the smallness of the House seemingly envisioned by the Philadelphia framers. The second prohibited any pay raise voted by members of Congress to themselves from taking effect until an election "shall have intervened." *See* J. GOEBEL, 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 442 n.162 (1971). Had all of the initial twelve proposals been ratified, we would, it is possible, have a dramatically different cognitive map of the Bill of Rights. At the very least, one would neither hear defenses of the "preferred" status of freedom of speech framed in terms of the "firstness" of (what we know as) the First Amendment, nor the wholly invalid inference drawn from that "firstness" of some special intention of the Framers to safeguard the particular rights laid out there.

2. "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

4. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

5. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend VI.

6. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

7. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

8. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. IV.

9. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

exercise clause of the First Amendment,[10] the just compensation clause of the Fifth Amendment,[11] and the Tenth Amendment.[12] Perhaps the most notable difference between the two maps, though, would be in regard to the Second Amendment: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." What would be at most only a blind alley for the ACLU mapmaker would, I am confident, be a major boulevard in the map drawn by the New Right adherent. It is this last anomaly that I want to explore in this essay.

I. THE POLITICS OF INTERPRETING THE SECOND AMENDMENT

To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion—law reviews,[13] casebooks,[14] and other

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10. "Congress shall make no law . . . prohibiting the free exercise thereof [religion]. . . ." U.S. CONST. amend I.

11. *See supra* note 8.

12. *See supra* note 9.

13. There are several law review articles discussing the Amendment. *See, e.g.*, Lund, *supra* note †, and the articles cited in Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177, 178 n.3 (1982). See also the valuable symposium on Gun Control, edited by Don Kates, in 49 LAW & CONTEMP. PROBS. 1-267 (1986), including articles by Shalhope, *The Armed Citizen in the Early Republic*, at 125; Kates, *The Second Amendment: A Dialogue*, at 143; Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* at 151. The symposium also includes a valuable bibliography of published materials on gun control, including Second Amendment considerations, at 251-67. The most important single article is almost undoubtedly Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). Not the least significant aspect of Kates' article is that it is basically the only one to have appeared in an "elite" law review. However, like many of the authors of other Second Amendment pieces, Kates is a practicing lawyer rather than a legal academic. I think it is accurate to say that no one recognized by the legal academy as a "major" writer on constitutional law has deigned to turn his or her talents to a full consideration of the Amendment. *But see* LaRue, *Constitutional Law and Constitutional History*, 36 BUFFALO L. REV. 373, 375-78 (1988) (briefly discussing Second Amendment). Akhil Reed Amar's reconsideration of the foundations of the Constitution also promises to delve more deeply into the implications of the Amendment. *See* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495-1500 (1987). Finally, there is one book that provides more in-depth treatment of the Second Amendment: S. HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984).

George Fletcher, in his study of the Berhard Goetz case, also suggests that Second Amendment analysis is not frivolous, though he does not elaborate the point. G. FLETCHER, A CRIME OF SELF-DEFENSE 156-58, 210-11 (1988).

One might well find this overt reference to "elite" law reviews and "major" writers objectionable, but it is foolish to believe that these distinctions do not exist within the academy or, more importantly, that we cannot learn about the sociology of academic discourse through taking them into account. No one can plausibly believe that the debates that define particular periods of academic discourse are a simple reflection of "natural" interest in the topic. Nothing helps an issue so much as its being taken up as an obsession by a distinguished professor from, say, Harvard or Yale.

14. One will search the "leading" casebooks in vain for any mention of the Second Amendment. Other than its being included in the text of the Constitution that all of the casebooks reprint, a reader would have no reason to believe that the Amendment exists or could possibly be of interest to the constitutional analyst. I must include, alas, P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2d ed. 1983), within this critique, though I have every reason to believe that this will not be true of the forthcoming third edition.

scholarly legal publications. As Professor LaRue has recently written, "the second amendment is not taken seriously by most scholars."[15]

Both Laurence Tribe[16] and the Illinois team of Nowak, Rotunda, and Young[17] at least acknowledge the existence of the Second Amendment in their respective treatises on constitutional law, perhaps because the treatise genre demands more encyclopedic coverage than does the casebook. Neither, however, pays it the compliment of extended analysis. Both marginalize the Amendment by relegating it to footnotes; it becomes what a deconstructionist might call a "supplement" to the ostensibly "real" Constitution that is privileged by discussion in the text.[18] Professor Tribe's footnote appears as part of a general discussion of congressional power. He asserts that the history of the Amendment "indicate[s] that the central concern of [its] framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy."[19] He does note, however, that "the debates surrounding congressional approval of the second amendment do contain references to individual self-protection as well as to states' rights," but he argues that the presence of the preamble to the Amendment, as well as the qualifying phrase " 'well regulated' makes any invocation of the amendment as a restriction on state or local gun control measures extremely problematic."[20] Nowak, Rotunda, and Young mention the Amendment in the context of the incorporation controversy, though they discuss its meaning at slightly greater length.[21] They state that "[t]he Supreme Court has not determined, at least not with any clarity, whether the amendment protects only a right of state governments against federal interference with state militia and police forces . . . or a right of individuals against the federal and state government[s]."[22]

Clearly the Second Amendment is not the only ignored patch of text in our constitutional conversations. One will find extraordinarily little discussion about another one of the initial Bill of Rights, the Third Amendment: "No Soldier shall, in time of peace be quartered in any house, with-

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15. LaRue, *supra* note 13, at 375.

16. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

17. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (3d ed. 1986).

18. For a brilliant and playful meditation on the way the legal world treats footnotes and other marginal phenomena, see Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 276-81 (1989).

19. TRIBE, *supra* note 16, at 299 n.6.

20. *Id.*; *see also* J. ELY, DEMOCRACY AND DISTRUST 95 (1980) ("[T]he framers and ratifiers . . . opted against leaving to the future the attribution of [other] purposes, choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted."). As shall be seen below, *see infra* text accompanying note 38, the preamble may be less plain in its meaning than Tribe's (and Ely's) confident argument suggests.

21. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 316 n.4. They do go on to cite a spate of articles by scholars who have debated the issue.

22. *Id.* at 316 n.4.

out the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Nor does one hear much about letters of marque and reprisal[23] or the granting of titles of nobility.[24] There are, however, some differences that are worth noting.

The Third Amendment, to take the easiest case, is ignored because it is in fact of no current importance whatsoever (although it did, for obvious reasons, have importance at the time of the founding). It has never, for a single instant, been viewed by any body of modern lawyers or groups of laity as highly relevant to their legal or political concerns. For this reason, there is almost no caselaw on the Amendment.[25] I suspect that few among even the highly sophisticated readers of this Journal can summon up the Amendment without the aid of the text.

The Second Amendment, though, is radically different from these other pieces of constitutional text just mentioned, which all share the attribute of being basically irrelevant to any ongoing political struggles. To grasp the difference, one might simply begin by noting that it is not at all unusual for the Second Amendment to show up in letters to the editors of newspapers and magazines.[26] That judges and academic lawyers, including the ones who write casebooks, ignore it is most certainly not evidence for the proposition that no one cares about it. The National Rifle Association, to name the most obvious example, cares deeply about the Amendment, and an apparently serious Senator of the United States averred that the right to keep and bear arms is the "right most valued by free men."[27] Campaigns for Congress in both political parties, and even presidential

23. U.S. CONST. art. I, § 10.

24. U.S. CONST. art. I, § 9, cl. 8.

25. *See, e.g.*, LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 923 (1964), which quotes the Amendment and then a comment from MILLER, THE CONSTITUTION 646 (1893): "This amendment seems to have been thought necessary. It does not appear to have been the subject of judicial exposition; and it is so thoroughly in accord with our ideas, that further comment is unnecessary." *Cf.* Engblom v. Carey, 724 F.2d 28 (2d Cir. 1983), *aff'g* 572 F. Supp. 44 (S.D.N.Y. 1983). *Engblom* grew out of a "statewide strike of correction officers, when they were evicted from their facility-residences . . . and members of the National Guard were housed in their residences without their consent." The district court had initially granted summary judgment for the defendants in a suit brought by the officers claiming a deprivation of their rights under the Third Amendment. The Second Circuit, however, reversed on the ground that it could not "say that as a matter of law appellants were not entitled to the protection of the Third Amendment." Engblom v. Carey, 677 F.2d 957, 964 (2d Cir. 1982). The District Court on remand held that, as the Third Amendment rights had not been clearly established at the time of the strike, the defendants were protected by a qualified immunity, and it is this opinion that was upheld by the Second Circuit. I am grateful to Mark Tushnet for bringing this case to my attention.

26. *See, e.g.*, *The Firearms the Second Amendment Protects*, N.Y. Times, June 9, 1988, at A22, col. 2 (three letters); *Second Amendment and Gun Control*, L.A. Times, March 11, 1989, Part II, at 9 col. 1 (nine letters); *What 'Right to Bear Arms'?*, N.Y. Times, July 20, 1989, at A23, col. 1 (national ed.) (op. ed. essay by Daniel Abrams); *see also We Rebelled To Protect Our Gun Rights*, Washington Times, July 20, 1989, at F2, col. 4.

27. *See* SUBCOMMITTEE ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, 97th Cong., 2d Sess. viii (1982) (preface by Senator Orrin Hatch) [hereinafter THE RIGHT TO KEEP AND BEAR ARMS].

campaigns, may turn on the apparent commitment of the candidates to a particular view of the Second Amendment. This reality of the political process reflects the fact that millions of Americans, even if (or perhaps *especially* if) they are not academics, can quote the Amendment and would disdain any presentation of the Bill of Rights that did not give it a place of pride.

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy,[28] is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation. Thus the title of this essay—*The Embarrassing Second Amendment*—for I want to suggest that the Amendment may be profoundly embarrassing to many who both support such regulation and view themselves as committed to zealous adherence to the Bill of Rights (such as most members of the ACLU). Indeed, one sometimes discovers members of the NRA who are equally committed members of the ACLU, differing with the latter only on the issue of the Second Amendment but otherwise genuinely sharing the libertarian viewpoint of the ACLU.

It is not my style to offer "correct" or "incorrect" interpretations of the Constitution.[29] My major interest is in delineating the rhetorical structures of American constitutional argument and elaborating what is sometimes called the "politics of interpretation," that is, the factors that explain why one or another approach will appeal to certain analysts at certain times, while other analysts, or times, will favor quite different approaches. Thus my general tendency to regard as wholly untenable any approach to the Constitution that describes itself as obviously correct and condemns its opposition as simply wrong holds for the Second Amendment as well. In some contexts, this would lead me to label as tendentious the certainty of NRA advocates that the Amendment means precisely what they assert it does. In this particular context—i.e., the pages of a journal whose audience is much more likely to be drawn from an elite, liberal portion of the public—I will instead be suggesting that the skepticism should run in the other direction. That is, we might consider the possibility that "our" views of the Amendment, perhaps best reflected in Professor Tribe's offhand treatment of it, might themselves be equally deserving of the "tendentious" label.

28. *See supra* notes 13-14.

29. *See* Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131 (1988).

II. The Rhetorical Structures of the Right to Bear Arms

My colleague Philip Bobbitt has, in his book *Constitutional Fate*,[30] spelled out six approaches—or "modalities," as he terms them—of constitutional argument. These approaches, he argues, comprise what might be termed our legal grammar. They are the rhetorical structures within which "law-talk" as a recognizable form of conversation is carried on. The six are as follows:

1) textual argument—appeals to the unadorned language of the text;[31]

2) historical argument—appeals to the historical background of the provision being considered, whether the history considered be general, such as background but clearly crucial events (such as the American Revolution), or specific appeals to the so-called intentions of the framers;[32]

3) structural argument—analyses inferred from the particular structures established by the Constitution, including the tripartite division of the national government; the separate existence of both state and nation as political entities; and the structured role of citizens within the political order;[33]

4) doctrinal argument—emphasis on the implications of prior cases decided by the Supreme Court;[34]

5) prudential argument—emphasis on the consequences of adopting a proferred decision in any given case;[35] and, finally,

6) ethical argument—reliance on the overall "ethos" of limited government as centrally constituting American political culture.[36]

I want to frame my consideration of the Second Amendment within the first five of Bobbitt's categories; they are all richly present in consideration of what the Amendment might mean. The sixth, which emphasizes the ethos of limited government, does not play a significant role in the debate of the Second Amendment.[37]

A. *Text*

I begin with the appeal to text. Recall the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." No one has

30. P. Bobbitt, Constitutional Fate (1982).
31. *Id.* at 25-38.
32. *Id.* at 9-24.
33. *Id.* at 74-92.
34. *Id.* at 39-58.
35. *Id* at 59-73.
36. *Id.* at 93-119.
37. For the record, I should note that Bobbitt disagrees with this statement, making an eloquent appeal (in conversation) on behalf of the classic American value of self-reliance for the defense of oneself and, perhaps more importantly, one's family. I certainly do not doubt the possibility of constructing an "ethical" rationale for limiting the state's power to prohibit private gun ownership. Nonetheless, I would claim that no one unpersuaded by any of the arguments derived from the first five modes would suddenly change his or her mind upon being presented with an "ethical" argument.

ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions. What is special about the Amendment is the inclusion of an opening clause—a preamble, if you will—that seems to set out its purpose. No similar clause is a part of any other Amendment,[38] though that does not, of course, mean that we do not ascribe purposes to them. It would be impossible to make sense of the Constitution if we did not engage in the ascription of purpose. Indeed, the major debates about the First Amendment arise precisely when one tries to discern a purpose, given that "literalism" is a hopelessly failing approach to interpreting it. We usually do not even recognize punishment of fraud—a classic speech act—as a free speech problem because we so sensibly assume that the purpose of the First Amendment could not have been, for example, to protect the circulation of patently deceptive information to potential investors in commercial enterprises. The sharp differences that distinguish those who would limit the reach of the First Amendment to "political" speech from those who would extend it much further, encompassing non-deceptive commercial speech, are all derived from different readings of the purpose that underlies the raw text.[39]

A standard move of those legal analysts who wish to limit the Second Amendment's force is to focus on its "preamble" as setting out a restrictive purpose. Recall Laurence Tribe's assertion that that purpose was to allow the states to keep their militias and to protect them against the possibility that the new national government will use its power to establish a powerful standing army and eliminate the state militias. This purposive reading quickly disposes of any notion that there is an "individual" right to keep and bear arms. The right, if such it be, is only a state's right. The consequence of this reading is obvious: the national government has the power to regulate—to the point of prohibition—private ownership of guns, since that has, by stipulation, nothing to do with preserving state militias. This is, indeed, the position of the ACLU, which reads the Amendment as protecting only the right of "maintaining an effective state militia. . . . [T]he individual's right to bear arms applies only to the preservation or efficiency of a well-regulated [state] militia. Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected."[40]

This is not a wholly implausible reading, but one might ask why the

38. *Cf., e.g.*, the patents and copyrights clause, which sets out the power of Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I., § 8.

39. For examples of this, see F. SCHAUER, FREEDOM OF SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Levinson, *First Amendment, Freedom of Speech, Freedom of Expression: Does It Matter What We Call It?* 80 NW. U.L. REV. 767 (1985) (reviewing M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984)).

40. ACLU Policy #47. I am grateful to Joan Mahoney, a member of the national board of the ACLU, for providing me with a text of the ACLU's current policy on gun control.

Framers did not simply say something like "Congress shall have no power to prohibit state-organized and directed militias." Perhaps they in fact meant to do something else. Moreover, we might ask if ordinary readers of late 18th Century legal prose would have interpreted it as meaning something else. The text at best provides only a starting point for a conversation. In this specific instance, it does not come close to resolving the questions posed by federal regulation of arms. Even if we accept the preamble as significant, we must still try to figure out what might be suggested by guaranteeing to "the people the right to keep and bear arms;" moreover, as we shall see presently, even the preamble presents unexpected difficulties in interpretation.

B. *History*

One might argue (and some have) that the substantive right is one pertaining to a collective body—"the people"—rather than to individuals. Professor Cress, for example, argues that state constitutions regularly used the words "man" or "person" in regard to "individual rights such as freedom of conscience," whereas the use in those constitutions of the term "the people" in regard to a right to bear arms is intended to refer to the "sovereign citizenry" collectively organized.[41] Such an argument founders, however, upon examination of the text of the federal Bill of Rights itself and the usage there of the term "the people" in the First, Fourth, Ninth, and Tenth Amendments.

Consider that the Fourth Amendment protects "[t]he right of the people to be secure in their persons," or that the First Amendment refers to the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is difficult to know how one might plausibly read the Fourth Amendment as other than a protection of individual rights, and it would approach the frivolous to read the assembly and petition clause as referring only to the right of state legislatures to meet and pass a remonstrance directed to Congress or the President against some governmental act. The Tenth Amendment is trickier, though it does explicitly differentiate between "states" and "the people" in terms of retained rights.[42] Concededly, it would be possible to read the Tenth Amendment as suggesting only an ultimate right of revolution by the collective people should the "states" stray too far from their designated role of protecting the rights of the people. This reading follows directly from the social contract theory of the state. (But, of course, many of these rights are held by individuals.)

Although the record is suitably complicated, it seems tendentious to re-

41. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984).
42. *See* U.S. CONST. amend. X.

ject out of hand the argument that one purpose of the Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct.[43] Historian Robert E. Shalhope supports this view, arguing in his article *The Ideological Origins of the Second Amendment*[44] that the Amendment guarantees individuals the right "to possess arms for their own personal defense."[45] It would be especially unsurprising if this were the case, given the fact that the development of a professional police force (even within large American cities) was still at least a half century away at the end of the colonial period.[46] I shall return later in this essay to this individualist notion of the Amendment, particularly in regard to the argument that "changing circumstances," including the development of a professional police force, have deprived it of any continuing plausibility. But I want now to explore a second possible purpose of the Amendment, which as a sometime political theorist I find considerably more interesting.

Assume, as Professor Cress has argued, that the Second Amendment refers to a communitarian, rather than an individual, right.[47] We are still left the task of defining the relationship between the community and the state apparatus. It is this fascinating problem to which I now turn.

Consider once more the preamble and its reference to the importance of a well-regulated militia. Is the meaning of the term obvious? Perhaps we should make some effort to find out what the term "militia" meant to 18th century readers and writers, rather than assume that it refers only to Dan Quayle's Indiana National Guard and the like. By no means am I arguing that the discovery of that meaning is dispositive as to the general meaning of the Constitution for us today. But it seems foolhardy to be entirely uninterested in the historical philology behind the Second Amendment.

I, for one, have been persuaded that the term "militia" did not have the limited reference that Professor Cress and many modern legal analysts assign to it. There is strong evidence that "militia" refers to all of the

43. For a full articulation of the the individualist view of the Second Amendment, see Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983). One can also find an efficient presentation of this view in Lund, *supra* note †, at 117.

44. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

45. *Id.* at 614.

46. See Daniel Boorstin's laconic comment that "the requirements for self-defense and food-gathering had put firearms in the hands of nearly everyone" in colonial America. D. BOORSTIN, THE AMERICANS—THE COLONIAL EXPERIENCE 353 (1958). The beginnings of a professional police force in Boston are traced in R. LANE, POLICING THE CITY: BOSTON 1822-1855 (1967). Lane argues that as of the earlier of his two dates, "all the major eastern cities . . . had several kinds of officials serving various police functions, all of them haphazardly inherited from the British and colonial past. These agents were gradually drawn into better defined and more coherent organizations." *Id.* at 1. However, as Oscar Handlin points out in his introduction to the book, "to bring into being a professional police force was to create precisely the kind of hireling body considered dangerous by conventional political theory." *Id.* at vii.

47. *See* Cress, *supra* note 41.

people, or at least all of those treated as full citizens of the community. Consider, for example, the question asked by George Mason, one of the Virginians who refused to sign the Constitution because of its lack of a Bill of Rights: "Who are the Militia? They consist now of the whole people."[48] Similarly, the *Federal Farmer*, one of the most important Anti-Federalist opponents of the Constitution, referred to a "militia, when properly formed, [as] in fact the people themselves."[49] We have, of course, moved now from text to history. And this history is most interesting, especially when we look at the development of notions of popular sovereignty. It has become almost a cliche of contemporary American historiography to link the development of American political thought, including its constitutional aspects, to republican thought in England, the "country" critique of the powerful "court" centered in London.

One of this school's important writers, of course, was James Harrington, who not only was influential at the time but also has recently been given a certain pride of place by one of the most prominent of contemporary "neo-republicans," Professor Frank Michelman.[50] One historian describes Harrington as having made "the most significant contribution to English libertarian attitudes toward arms, the individual, and society."[51] He was a central figure in the development of the ideas of popular sovereignty and republicanism.[52] For Harrington, preservation of republican liberty requires independence, which rests primarily on possession of adequate property to make men free from coercion by employers or landlords. But widespread ownership of land is not sufficient. These independent yeoman should also bear arms. As Professor Morgan puts it, "[T]hese independent yeomen, armed and embodied in a militia, are also a popular government's best protection against its enemies, whether they be aggressive foreign monarchs or scheming demagogues within the nation itself."[53]

A central fear of Harrington and of all future republicans was a standing army, composed of professional soldiers. Harrington and his fellow republicans viewed a standing army as a threat to freedom, to be avoided at almost all costs. Thus, says Morgan, "A militia is the only safe form of military power that a popular government can employ; and because it is

48. 3 J. ELLIOT, DEBATES IN THE GENERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788), *reprinted in* Kates, *supra* note 13, at 216 n.51.

49. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 123 (W. Bennett ed. 1978) (ascribed to Richard Henry Lee), *reprinted in* Kates, *supra* note 13, at 216 n.51.

50. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 39 (1986) (Harrington is "pivotal figure in the history of the 'Atlantic' branch of republicanism that would find its way to America").

51. Shalhope, *supra* note 44, at 602.

52. Edmund Morgan discusses Harrington in his recent book, INVENTING THE PEOPLE 85-87 (1988) (analyzing notion of popular sovereignty in American thought).

53. *Id.* at 156.

composed of the armed yeomanry, it will prevail over the mercenary professionals who man the armies of neighboring monarchs."[54]

Scholars of the First Amendment have made us aware of the importance of John Trenchard and Thomas Gordon, whose *Cato's Letter's* were central to the formation of the American notion of freedom of the press. That notion includes what Vincent Blasi would come to call the "checking value" of a free press, which stands as a sturdy exposer of governmental misdeeds.[55] Consider the possibility, though, that the ultimate "checking value" in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny.[56] Indeed, one of Cato's letters refers to "the Exercise of despotick Power [as] the unrelenting War of an armed Tyrant upon his unarmed Subjects. . . ."[57]

Cress persuasively shows that no one defended universal possession of arms. New Hampshire had no objection to disarming those who "are or have been in actual rebellion," just as Samuel Adams stressed that only "peaceable citizens" should be protected in their right of "keeping their own arms."[58] All these points can be conceded, however, without conceding as well that Congress—or, for that matter, the States—had the power to disarm these "peaceable citizens."

Surely one of the foundations of American political thought of the period was the well-justified concern about political corruption and consequent governmental tyranny. Even the Federalists, fending off their opponents who accused them of foisting an oppressive new scheme upon the American people, were careful to acknowledge the risks of tyranny. James Madison, for example, speaks in *Federalist* Number Forty-Six of "the advantage of being armed, which the Americans possess over the people of

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54. *Id.* at 157. Morgan argues, incidentally, that the armed yeomanry was neither effective as a fighting force nor particularly protective of popular liberty, but that is another matter. For our purposes, the ideological perceptions are surely more important than the "reality" accompanying them. *Id.* at 160-65.

55. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

56. *See* Lund, *supra* note †, at 111-16.

57. Shalhope, *supra* note 44, at 603 (quoting 1755 edition of *Cato's Letters*).

Shalhope also quotes from James Burgh, another English writer well known to American revolutionaries:

> The possession of arms is the distinction between a freeman and a slave. He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses; else he lives precariously, and at discretion.

Id. at 604. To be sure, Burgh also wrote that only men of property should in fact comprise the militia: "A militia consisting of any others than the men of *property* in a country, is no militia; but a mungrel army." Cress, *supra* note 41, at 27 (emphasis in original) (quoting J. BURGH, 2 POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES (1774-75). Presumably, though, the widespread distribution of property would bring with it equally widespread access to arms and membership in the militia.

58. *See* Cress, *supra* note 41, at 34.

almost every other nation."[59] The advantage in question was not merely the defense of American borders; a standing army might well accomplish that. Rather, an armed public was advantageous in protecting political liberty. It is therefore no surprise that the Federal Farmer, the nom de plume of an anti-federalist critic of the new Constitution and its absence of a Bill of Rights, could write that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them. . . ."[60] On this matter, at least, there was no cleavage between the pro-ratification Madison and his opponent.

In his influential *Commentaries on the Constitution*, Joseph Story, certainly no friend of Anti-Federalism, emphasized the "importance" of the Second Amendment.[61] He went on to describe the militia as "the natural defence of a free country" not only "against sudden foreign invasions" and "domestic insurrections," with which one might well expect a Federalist to be concerned, but also against "domestic usurpations of power by rulers."[62] "The right of the citizens to keep and bear arms has justly been considered," Story wrote, "as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[63]

We also see this blending of individualist and collective accounts of the right to bear arms in remarks by Judge Thomas Cooley, one of the most influential 19th century constitutional commentators. Noting that the state might call into its official militia only "a small number" of the eligible citizenry, Cooley wrote that "if the right [to keep and bear arms] were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check."[64] Finally, it is worth noting the remarks of Theodore

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59. THE FEDERALIST No. 46, at 299 (J. Madsion) (C. Rossiter ed. 1961).

60. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed. 1978).

61. 3 J. STORY, COMMENTARIES § 1890 (1833), *quoted in* 5 THE FOUNDERS' CONSTITUTION 214 (P. Kurland & R. Lerner eds. 1987).

62. *Id.*

63. *Id.* Lawrence Cress, despite his forceful critique of Shalhope's individualist rendering of the Second Amendment, nonetheless himself notes that "[t]he danger posed by manipulating demagogues, *ambitious rulers*, and foreign invaders to free institutions required the vigilance of citizen-soldiers cognizant of the common good." Cress, *supra* note 41, at 41 (emphasis added).

64. T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298 (3d ed. 1898):

> The right of the people to bear arms in their own defence, and to form and drill military organizations in defence of the State, may not be very important in this country, but it is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people. Should the contingency ever arise when it would be necessary for the people to make use of the arms in their hands for the protection of constitutional liberty, the proceeding, so far from being revolutionary, would be in strict accord with popular right and duty.

Schroeder, one of the most important developers of the theory of freedom of speech early in this century.[65] "[T]he obvious import [of the constitutional guarantee to carry arms]," he argues, "is to promote a state of preparedness for self-defense even against the invasions of government, because only governments have ever disarmed any considerable class of people as a means toward their enslavement."[66]

Such analyses provide the basis for Edward Abbey's revision of a common bumper sticker, "If guns are outlawed, only the government will have guns."[67] One of the things this slogan has helped me to understand is the political tilt contained within the Weberian definition of the state—i.e., the repository of a monopoly of the legitimate means of violence[68]—that is so commonly used by political scientists. It is a profoundly statist definition, the product of a specifically German tradition of the (strong) state rather than of a strikingly different American political tradition that is fundamentally mistrustful of state power and vigilant about maintaining ultimate power, including the power of arms, in the populace.

We thus see what I think is one of the most interesting points in regard to the new historiography of the Second Amendment—its linkage to conceptions of republican political order. Contemporary admirers of republican theory use it as a source both of critiques of more individualist liberal theory and of positive insight into the way we today might reorder our political lives.[69] One point of emphasis for neo-republicans is the value of participation in government, as contrasted to mere representation by a distant leadership, even if formally elected. But the implications of republicanism might push us in unexpected, even embarrassing, directions: just as ordinary citizens should participate actively in governmental decision-making through offering their own deliberative insights, rather than be confined to casting ballots once every two or four years for those very few individuals who will actually make decisions, so should ordinary citizens participate in the process of law enforcement and defense of liberty rather

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Cooley advanced this same idea in *The Abnegation of Self-Government*, 12 PRINCETON REV. 213-14 (1883).

65. *See* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 560 (1981) ("[P]rodigious theoretical writings of Theodore Schroeder . . . were the most extensive and libertarian treatments of freedom of speech in the prewar period"); *see also* GRABER, TRANSFORMING FREE SPEECH (forthcoming 1990) (manuscript at 4-12; on file with author).

66. T. SCHROEDER, FREE SPEECH FOR RADICALS 104 (reprint ed. 1969).

67. Shalhope, *supra* note 44, at 45.

68. See M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (T. Parsons ed. 1947), where he lists among "[t]he primary formal characteristics of the modern state" the fact that:

> to-day, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it . . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.

69. *See, e.g., Symposium: The Republican Civil Tradition*, 97 YALE L.J. 1493-1723 (1988).

than rely on professionalized peacekeepers, whether we call them standing armies or police.

C. *Structure*

We have also passed imperceptibly into a form of structural argument, for we see that one aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen. That is, those who would limit the meaning of the Second Amendment to the constitutional protection of state-controlled militias agree that such protection rests on the perception that militarily competent states were viewed as a potential protection against a tyrannical national government. Indeed, in 1801 several governors threatened to call out state militias if the Federalists in Congress refused to elect Thomas Jefferson president.[70] But this argument assumes that there are only two basic components in the vertical structure of the American polity—the national government and the states. It ignores the implication that might be drawn from the Second, Ninth, and Tenth Amendments: the citizenry itself can be viewed as an important third component of republican governance insofar as it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.

One implication of this republican rationale for the Second Amendment is that it calls into question the ability of a state to disarm its citizenry. That is, the strongest version of the republican argument would hold it to be a "privilege and immunity of United States citizenship"—of membership in a liberty-enhancing political order—to keep arms that could be taken up against tyranny wherever found, including, obviously, state government. Ironically, the principal citation supporting this argument is to Chief Justice Taney's egregious opinion in *Dred Scott*,[71] where he suggested that an uncontroversial attribute of citizenship, in addition to the right to migrate from one state to another, was the right to possess arms. The logic of Taney's argument at this point seems to be that, because it was inconceivable that the Framers could have genuinely imagined blacks having the right to possess arms, it follows that they could not have envisioned them as being citizens, since citizenship entailed that right. Taney's seeming recognition of a right to arms is much relied on by opponents of gun control.[72] Indeed, recall Madison's critique, in *Federalist* Numbers Ten and Fourteen, of republicanism's traditional emphasis on the desira-

70. *See* D. MALONE, 4 JEFFERSON AND HIS TIMES: JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 7-11 (1970) (republican leaders ready to use state militias to resist should lame duck Congress attempt to violate clear dictates of Article II by designating someone other than Thomas Jefferson as President in 1801).

71. Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857).

72. *See, e.g.*, Featherstone, Gardiner & Dowlut, *The Second Amendment to the United States Constitution Guarantees an Individual Right to Keep and Bear Arms*, in THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 27, at 100.

bility of small states as preservers of republican liberty. He transformed this debate by arguing that the states would be less likely to preserve liberty because they could so easily fall under the sway of a local dominant faction, whereas an extended republic would guard against this danger. Anyone who accepts the Madisonian argument could scarcely be happy enhancing the powers of the states over their own citizens; indeed, this has been one of the great themes of American constitutional history, as the nationalization of the Bill of Rights has been deemed necessary in order to protect popular liberty against state depredation.

D. *Doctrine*

Inevitably one must at least mention, even though there is not space to discuss fully, the so-called incorporation controversy regarding the application of the Bill of Rights to the states through the Fourteenth Amendment. It should be no surprise that the opponents of gun control appear to take a "full incorporationist" view of that Amendment.[73] They view the privileges and immunities clause, which was eviscerated in the *Slaughter-house Cases*,[74] as designed to require the states to honor the rights that had been held, by Justice Marshall in *Barron v. Baltimore* in 1833,[75] to restrict only the national government. In 1875 the Court stated, in *United States v. Cruikshank*,[76] that the Second Amendment, insofar as it grants any right at all, "means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . ." Lest there be any remaining doubt on this point, the Court specifically cited the *Cruikshank* language eleven years later in *Presser v. Illinois*,[77] in rejecting the claim that the Second Amendment served to invalidate an Illinois statute that prohibited "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States. . .to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof. . . ."[78]

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73. *See, e.g.*, Halbrook, *The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers*, in THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 27, at 79. Not the least of the ironies observed in the debate about the Second Amendment is that N.R.A.-oriented conservatives like Senator Hatch could scarcely have been happy with the wholesale attack leveled by former Attorney General Meese on the incorporation doctrine, for here is one area where some "conservatives" may in fact be more zealous adherents of that doctrine than are most liberals, who, at least where the Second Amendment is concerned, have a considerably more selective view of incorporation.

74. 83 U.S. 36 (1873).

75. 32 U.S. (7 Pet.) 243 (1833).

76. 92 U.S. 542, 553 (1875).

77. 116 U.S. 252, 267 (1886). For a fascinating discussion of *Presser*, see Larue, *supra* note 13, at 386-90.

78. 116 U.S. at 253. There is good reason to believe this statute, passed by the Illinois legislature in 1879, was part of an effort to control (and, indeed, suppress) widespread labor unrest linked to the economic troubles of the time. For the background of the Illinois statute, see P. AVRICH, THE HAYMARKET TRAGEDY 45 (1984):

The first "incorporation decision," *Chicago, B. & Q. R. Co. v. Chicago*,[79] was not delivered until eleven years after *Presser*; one therefore cannot know if the judges in *Cruikshank* and *Presser* were willing to concede that *any* of the amendments comprising the Bill of Rights were anything more than limitations on congressional or other national power. The obvious question, given the modern legal reality of the incorporation of almost all of the rights protected by the First, Fourth, Fifth, Sixth, and Eighth Amendments, is what exactly justifies treating the Second Amendment as the great exception. Why, that is, should *Cruikshank* and *Presser* be regarded as binding precedent any more than any of the other "pre-incorporation" decisions refusing to apply given aspects of the Bill of Rights against the states?

If one agrees with Professor Tribe that the Amendment is simply a federalist protection of state rights, then presumably there is nothing to incorporate.[80] If, however, one accepts the Amendment as a serious substantive limitation on the ability of the national government to regulate the private possession of arms based on either the "individualist" or "neo-republican" theories sketched above, then why not follow the "incorporationist" logic applied to other amendments and limit the states as well in their powers to regulate (and especially to prohibit) such possession? The

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As early as 1875, a small group of Chicago socialists, most of them German immigrants, had formed an armed club to protect the workers against police and military assaults, as well as against physical intimidation at the polls. In the eyes of its supporters . . . the need for such a group was amply demonstrated by the behavior of the police and [state-controlled] militia during the Great Strike of 1877, a national protest by labor triggered by a ten percent cut in wages by the Baltimore and Ohio Railroad, which included the breaking up of workers' meetings, the arrest of socialist leaders, [and] the use of club, pistol, and bayonet against strikers and their supporters . . . . Workers . . . were resolved never again to be shot and beaten without resistance. Nor would they stand idly by while their meeting places were invaded or their wives and children assaulted. They were determined, as Albert Parsons [a leader of the anarchist movement in Chicago] expressed it, to defend both "their persons and their rights."

79. 166 U.S. 226 (1897) (protecting rights of property owners by requiring compensation for takings of property).

80. My colleague Douglas Laycock has reminded me that a similar argument was made by some conservatives in regard to the establishment clause of the First Amendment. Thus, Justice Brennan noted that "[i]t has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation 'respecting an establishment of religion' is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to *disestablish* the existing official state churches." Abington School Dist. v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (emphasis added). According to this reading, it would be illogical to apply the establishment clause against the states "because that clause is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual," *id.* at 256, inasmuch as it is only a federalist protection of states against a national establishment (or disestablishment). "The fallacy in this contention," responds Brennan, "is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty." *Id.* Whatever the sometimes bitter debates about the precise meaning of "establishment," it is surely the case that Justice Brennan, even as he almost cheerfully concedes that at one point in our history the "states-right" reading of the establishment clause would have been thoroughly plausible, expresses what has become the generally accepted view as to the establishment clause being some kind of limitation on the state as well as on the national government. One may wonder whether the interpretive history of the establishment clause might have any lessons for the interpretation of the Second Amendment.

Supreme Court has almost shamelessly refused to discuss the issue,[81] but that need not stop the rest of us.

Returning, though, to the question of Congress' power to regulate the keeping and bearing of arms, one notes that there is, basically, only one modern case that discusses the issue, *United States v. Miller*,[82] decided in 1939. Jack Miller was charged with moving a sawed-off shotgun in interstate commerce in violation of the National Firearms Act of 1934. Among other things, Miller and a compatriot had not registered the firearm, as required by the Act. The court below had dismissed the charge, accepting Miller's argument that the Act violated the Second Amendment.

The Supreme Court reversed unanimously, with the arch-conservative Justice McReynolds writing the opinion.[83] Interestingly enough, he emphasized that there was no evidence showing that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."[84] And "[c]ertainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[85] *Miller* might have had a tenable argument had he been able to show that he was keeping or bearing a weapon that clearly had a potential military use.[86]

Justice McReynolds went on to describe the purpose of the Second Amendment as "assur[ing] the continuation and render[ing] possible the effectiveness of [the Militia]."[87] He contrasted the Militia with troops of a standing army, which the Constitution indeed forbade the states to keep without the explicit consent of Congress. "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."[88] McReynolds noted further that "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators [all] [s]how plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense."[89]

It is difficult to read *Miller* as rendering the Second Amendment meaningless as a control on Congress. Ironically, *Miller* can be read to support

81. It refused, for example, to review the most important modern gun control case, Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), where the Seventh Circuit Court of Appeals upheld a local ordinance in Morton Grove, Illinois, prohibiting the possession of handguns within its borders.

82. 307 U.S. 174 (1939).

83. Justice Douglas, however, did not participate in the case.

84. *Miller*, 307 U.S. at 178.

85. *Id.* at 178 (citation omitted).

86. Lund notes that "commentators have since demonstrated that sawed-off or short-barreled shotguns are commonly used as military weapons." Lund, *supra* note †, at 109.

87. 307 U.S. at 178.

88. *Id.* at 179.

89. *Id.*

some of the most extreme anti-gun control arguments, e.g., that the individual citizen has a right to keep and bear bazookas, rocket launchers, and other armaments that are clearly relevant to modern warfare, including, of course, assault weapons. Arguments about the constitutional legitimacy of a prohibition by Congress of private ownership of handguns or, what is much more likely, assault rifles, might turn on the usefulness of such guns in military settings.

E. *Prudentialism*

We have looked at four of Bobbitt's categories—text, history, structure, and caselaw doctrine—and have seen, at the very least, that the arguments on behalf of a "strong" Second Amendment are stronger than many of us might wish were the case. This, then, brings us to the fifth category, prudentialism, or an attentiveness to practical consequences, which is clearly of great importance in any debates about gun control. The standard argument in favor of strict control and, ultimately, prohibition of private ownership focuses on the extensive social costs of widespread distribution of firearms. Consider, for example, a recent speech given by former Justice Lewis Powell to the American Bar Association. He noted that over 40,000 murders were committed in the United States in 1986 and 1987, and that fully sixty percent of them were committed with firearms. England and Wales, however, saw only 662 homicides in 1986, less than eight percent of which were committed with firearms.[90] Justice Powell indicated that, "[w]ith respect to handguns," in contrast "to sporting rifles and shotguns[,] it is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society."[91]

It is hard to disagree with Justice Powell; it appears almost crazy to protect as a constitutional right something that so clearly results in extraordinary social costs with little, if any, compensating social advantage. Indeed, since Justice Powell's talk, the subject of assault rifles has become a staple of national discussion, and the opponents of regulation of such weapons have deservedly drawn the censure even of conservative leaders like William Bennett. It is almost impossible to imagine that the judiciary would strike down a determination by Congress that the possession of assault weapons should be denied to private citizens.

Even if one accepts the historical plausibility of the arguments advanced above, the overriding temptation is to say that times and circumstances have changed and that there is simply no reason to continue enforcing an

90. L. Powell, Capital Punishment, Remarks Delivered to the Criminal Justice Section, ABA 10 (Aug. 7, 1988).
91. *Id.* at 11.

outmoded, and indeed dangerous, understanding of private rights against public order. This criticism is clearest in regard to the so-called individualist argument, for one can argue that the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime.[92]

I am not unsympathetic to such arguments. It is no purpose of this essay to solicit membership for the National Rifle Association or to express any sympathy for what even Don Kates, a strong critic of the conventional dismissal of the Second Amendment, describes as "the gun lobby's obnoxious habit of assailing all forms of regulation on 2nd Amendment grounds."[93] And yet . . . .

Circumstances may well have changed in regard to individual defense, although we ignore at our political peril the good-faith belief of many Americans that they cannot rely on the police for protection against a variety of criminals. Still, let us assume that the individualist reading of the Amendment has been vitiated by changing circumstances. Are we quite so confident that circumstances are equally different in regard to the republican rationale outlined earlier?

One would, of course, like to believe that the state, whether at the local or national level, presents no threat to important political values, including liberty. But our propensity to believe that this is the case may be little more than a sign of how truly different we are from our radical forbearers. I do not want to argue that the state is necessarily tyrannical; I am not an anarchist. But it seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state. The development of widespread suffrage and greater majoritarianism in our polity is itself no sure protection, at least within republican theory. The republican theory is predicated on the stark contrast between mere democracy, where people are motivated by selfish personal interest, and a republic, where civic virtue, both in citizens and leadership, tames selfishness on behalf of the common good. In any event, it is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic.[94]

Indeed, only in recent months have we seen the brutal suppression of the Chinese student demonstrations in Tianamen Square. It should not surprise us that some N.R.A. sympathizers have presented that situation as an object lesson to those who unthinkingly support the prohibition of

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92. This point is presumably demonstrated by the increasing public opposition of police officials to private possession of handguns (not to mention assault rifles).

93. D. Kates, Minimalist Interpretation of the Second Amendment 2 (draft Sept. 29, 1986) (unpublished manuscript available from author).

94. *See* Lund, *supra* note †, at 116.

private gun ownership. "[I]f all Chinese citizens kept arms, their rulers would hardly have dared to massacre the demonstrators . . . . The private keeping of hand-held personal firearms is within the constitutional design for a counter to government run amok . . . . As the Tianamen Square tragedy showed so graphically, AK-47s fall into that category of weapons, and that is why they are protected by the Second Amendment."[95] It is simply silly to respond that small arms are irrelevant against nuclear-armed states: Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point. The fact that these may not be pleasant examples does not affect the principal point, that a state facing a totally disarmed population is in a far better position, for good or for ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed.[96]

III. Taking the Second Amendment Seriously

There is one further problem of no small import: If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?[97] As Ronald Dworkin

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95. Wimmershoff-Caplan, *The Founders and the AK-47*, Washington Post, July 6, 1989, at A18, col. 4, *reprinted as Price of Gun Deaths Small Compared to Price of Liberty*, Austin American-Statesman, July 11, 1989, at A11. Ms. Wimmershoff-Caplan is identified as a "lawyer in New York" who is "a member of the National Board of the National Rifle Association." *Id.* One of the first such arguments in regard to the events at Tianamen Square was made by William A. Black in a letter, *Citizens Without Guns*, N.Y. Times, June 18, 1989 at D26, col. 6. Though describing himself as "find[ing] no glory in guns [and] a very profound anti-hunter," he nonetheless "stand[s] with those who would protect our right to keep and bear arms" and cited for support the fact that "none [of the Chinese soldiers] feared bullets: the citizens of China were long ago disarmed by the Communists." "Who knows," he asks, "what the leaders and the military and the police of our America will be up to at some point in the future? We need an armed citizenry to protect our liberty."

As one might expect, such arguments draw heated responses. *See* Rudlin, *The Founders and the AK-47 (Cont'd)*, Washington Post, July 20, 1989, at A22, col. 3. Jonathan Rudlin accused Ms. Wimmershoff-Caplan of engaging in Swiftian satire, as no one could "take such brilliant burlesque seriously " Neal Knox, however, endorsed her essay in full, adding the Holocaust to the list of examples: "Could the Holocaust have occurred if Europe's Jews had owned thousands of then-modern military Mauser bolt action rifles?" *See also* Washington Post, July 12, 1989, at A22, for other letters.

96. *See* Lund, *supra* note †, at 115:

> The decision to use military force is not determined solely by whether the contemplated benefits can be successfully obtained through the use of available forces, but rather is determined by the *ratio* of those benefits to the expected costs. It follows that any factor increasing the anticipated cost of a military operation makes the conduct of that operation incrementally more unlikely. This explains why a relatively poorly armed nation with a small population recently prevailed in a war against the United States, and it explains why governments bent on the oppression of their people almost always disarm the civilian population before undertaking more drastically oppressive measures.

97. *See* D. Kates, *supra* note 93, at 24–25 n.13, for a discussion of this point.

has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are. The very fact that there are often significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—helps to account for the observed fact that those who view themselves as defenders of the Bill of Rights are generally antagonistic to prudential arguments. Most often, one finds them embracing versions of textual, historical, or doctrinal argument that dismiss as almost crass and vulgar any insistence that times might have changed and made too "expensive" the continued adherence to a given view. "Cost-benefit" analysis, rightly or wrongly, has come to be viewed as a "conservative" weapon to attack liberal rights.[98] Yet one finds that the tables are strikingly turned when the Second Amendment comes into play. Here it is "conservatives" who argue in effect that social costs are irrelevant and "liberals" who argue for a notion of the "living Constitution" and "changed circumstances" that would have the practical consequence of removing any real bite from the Second Amendment.

As Fred Donaldson of Austin, Texas wrote, commenting on those who defended the Supreme Court's decision upholding flag-burning as compelled by a proper (and decidedly non-prudential) understanding of the First Amendment, "[I]t seems inconsistent for [defenders of the decision] to scream so loudly" at the prospect of limiting the protection given expression "while you smile complacently at the Second torn and bleeding. If the Second Amendment is not worth the paper it is written on, what price the First?"[99] The fact that Mr. Donaldson is an ordinary citizen rather than an eminent law professor does not make his question any less pointed or its answer less difficult.

For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do. It is time for the Second Amendment to enter full scale into the consciousness of the legal academy. Those of us who agree with Martha Minow's emphasis on the desirability of encour-

98. See, e.g., Justice Marshall's dissent, joined by Justice Brennan, in Skinner v. Railway Labor Executive Ass'n, 109 S. Ct. 1402 (1989), upholding the government's right to require drug tests of railroad employees following accidents. It begins with his chastising the majority for "ignor[ing] the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges," *id.* at 1423, and continues by arguing that "[t]he majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." *Id.* at 1426.

99. Donaldson, Letter to the Editor, Austin American-Statesman, July 8, 1989, at A19, col. 4.

aging different "voices" in the legal conversation[100] should be especially aware of the importance of recognizing the attempts of Mr. Donaldson and his millions of colleagues to join the conversation. To be sure, it is unlikely that Professor Minow had those too often peremptorily dismissed as "gun nuts" in mind as possible providers of "insight and growth," but surely the call for sensitivity to different or excluded voices cannot extend only to those groups "we" already, perhaps "complacent[ly]," believe have a lot to tell "us."[101] I am not so naive as to believe that conversation will overcome the chasm that now separates the sensibility of, say, Senator Hatch and myself as to what constitutes the "right[s] most valued by free men [and women]."[102] It is important to remember that one will still need to join up sides and engage in vigorous political struggle. But it might at least help to make the political sides appear more human to one another. Perhaps "we" might be led to stop referring casually to "gun nuts" just as, maybe, members of the NRA could be brought to understand the real fear that the currently almost uncontrolled system of gun ownership sparks in the minds of many whom they casually dismiss as "bleeding-heart liberals." Is not, after all, the possibility of serious, engaged discussion about political issues at the heart of what is most attractive in both liberal *and* republican versions of politics?

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100. *See* Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered,* 101 HARV. L REV. 10, 74-90 (1987). "We need settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth." *Id.* at 95; *see also* Getman, *Voices,* 66 TEX. L. REV. 577 (1988).

101. And, perhaps more to the point, "you" who insufficiently listen to "us" and to "our" favored groups.

102. *See supra* note 27 and accompanying text.